

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF VIRGINIA
3 Charlottesville Division

4 DR. HERBERT R. PUTZ,
5 Et al.,

Civil No. 3:09cv00003

6 Plaintiffs,

7 vs.

Charlottesville, Virginia

8 MICHAEL H. GOLDEN and
9 SUZANNE C. GOLDEN,

Defendants. May 28, 2009

10 TRANSCRIPT OF EVIDENTIARY HEARING
11 BEFORE THE HONORABLE B. WAUGH CRIGLER,
12 UNITED STATES MAGISTRATE JUDGE

13 APPEARANCES:

14 For the Plaintiff:

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18 For the Defendant:

19 Richmond & Fishburne
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22 Court Reporter:

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24
25 Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 THE COURT: Let the record reflect that this
2 is 3:09cv34, Herbert R. Putz, et al., versus Michael H.
3 Golden.

4 This matter is before the Court on a
5 reference order by Judge Moon who initially entered a
6 memorandum opinion and order sustaining the exercise of
7 personal jurisdiction over the defendants in this case
8 and then I guess he sort of vacated the order and sent
9 the matter to me for purposes of conducting an
10 evidentiary proceeding at which the plaintiff would have
11 the burden of showing by a preponderance of the evidence
12 that there is jurisdiction.

13 Are you prepared to proceed?

14 MR. LOWRY: Yes, sir, we are.

15 THE COURT: Are the defendants prepared to
16 proceed?

17 MR. HOEGE: Yes, Your Honor.

18 THE COURT: Do y'all want the rule on the
19 witnesses or is that necessary?

20 MR. LOWRY: Not necessary, as far as I'm
21 concerned.

22 MR. HOEGE: We would like it, Your Honor.

23 THE COURT: Is anybody but a party going to
24 testify?

25 MR. LOWRY: The only witnesses I'm aware of

1 are Dr. Putz and Mr. Golden.

2 THE COURT: Are there any other people here
3 to be witnesses in the case or are y'all just observers?

4 MR. HOEGE: Not on our side, Your Honor.

5 THE COURT: One of the things that has
6 occurred in the interim is there has been some
7 supplemental briefing that took place -- when I say
8 supplemental, there was a decision that was tendered to
9 the Court from the Fourth Circuit, an '09 decision, that
10 was written by Judge Duncan. She laid out all of the
11 factors that essentially are important for the Court's
12 consideration unless you don't think those factors are
13 applicable. I thought it would be a good framework to
14 go by, at least for analysis purposes, but I'll let the
15 plaintiff present whatever evidence they want.

16 There's bound to be stuff here that's not in
17 dispute and the only question is whether there's
18 something that is in dispute that people need to be
19 heard on.

20 MR. LOWRY: Right.

21 I'm not aware of the Court having received
22 that case, so I'm not exactly sure what case it is.

23 THE COURT: I'll tell you what case it is.
24 It's Consulting Engineers Corporation v. Geometric
25 Limited. It was decided March 23, 2009. It was sent to

1 me in sort of a fast case format. I didn't even go back
2 to check whether it's actually published.

3 MR. HOEGE: Your Honor, I think that's an
4 exhibit to the plaintiff's response.

5 MR. LOWRY: We're familiar with the case. I
6 thought this was something since our response.

7 THE COURT: No. It was just an informative
8 case. The facts are a little different here than there,
9 but the outline of the legal principles and the analysis
10 seem to be very helpful.

11 MR. LOWRY: I agree.

12 I think in his discussion in the law and the
13 memorandum opinion, which has now been vacated, Judge
14 Moon kind of tracked those same points, in his analysis.

15 THE COURT: He did.

16 As I see, the only issue here is whether the
17 defendant deliberately engaged in significant or long-
18 term business activities or whether there was contact
19 with the resident forum regarding the business
20 relationship. It seems to boil down for Judge Moon to
21 the question of the affidavit.

22 MR. LOWRY: Right.

23 THE COURT: He found that that was partial
24 performance, but nothing was raised concerning the
25 alleged tortious conduct.

1 MR. LOWRY: I'm prepared to offer through
2 Dr. Putz's testimony about the entire lengths of the
3 relationship and everything that happened, but if I
4 could, I'd like to make a proffer up to a certain point
5 where I know we have a dispute. If there's something
6 objectionable to the proffer, I'll go forward and
7 present the evidence on the whole nine yards.

8 THE COURT: Let's hear the proffer. If
9 counsel has an objection to it, we can deal with it on
10 that basis.

11 Is that satisfactory?

12 MR. LOWRY: Certainly.

13 MR. HOEGE: Yes, Your Honor. Thank you.

14 MR. LOWRY: I know Your Honor has read the
15 pleadings. I'll kind of hurry up --

16 THE COURT: Don't hurry. This is a case
17 where Judge Moon felt as though there needed to be an
18 evidentiary proceeding and far be it from me to cut it
19 short. I'm just trying to hone down on the real factual
20 issues that are in contention. That's all.

21 MR. LOWRY: I think what Judge Moon said in
22 his vacation order was that he hadn't realized at the
23 time he wrote his opinion that there had been a request
24 for an evidentiary hearing and so he felt like he had
25 gotten out ahead of the process by issuing the opinion

1 and was taking us back to square one.

2 THE COURT: He pushed the restart button.

3 MR. LOWRY: Right, pushed the restart
4 button.

5 Well, essentially, the way we got here is
6 that Dr. Putz was in Bora Bora, French Polynesia, I'll
7 just say as a broad term to cover all of this. He saw
8 these very nice vacation type bungalows. Was interested
9 in purchasing one. He made inquiries there and was
10 given the name of Mr. Golden as someone who owned a
11 bungalow and was interested in selling his interest and
12 they gave him contact information to reach the Goldens.
13 He then initially called and over the course of time,
14 had contacts with Mr. Golden by telephone, eventually
15 letter and e-mail.

16 THE COURT: But during those periods of
17 time, nobody was in Virginia.

18 MR. LOWRY: That's correct -- well, Dr. Putz
19 owned a farm in Virginia, but he was living in New York.
20 All these early contacts were in New York. I'll kind of
21 signal when we get up to the first Virginia contact.

22 Made the contact. They went through the
23 negotiating process. Goldens were interested in
24 selling. Dr. Putz was interested in buying. They
25 entered into a contract. Still all happening between

1 Washington State and New York, whereby Dr. Putz
2 eventually would be the purchaser of these -- of this
3 bungalow.

4 The way it's set up, which is very unusual
5 in this entity in French Polynesia is that you buy
6 certificates or stock that represents the bungalow that
7 you're getting. Eventually, you can have those
8 converted into a deed; their equivalent of a deed and
9 take title directly to the bungalow.

10 In setting up this transaction, Dr. Putz --

11 THE COURT: Is there a physical certificate
12 that gets transferred?

13 MR. LOWRY: Yes.

14 THE COURT: Any debate over that?

15 MR. HOEGE: Yes, Your Honor.

16 I've never seen a certificate. I've always
17 heard this called a share, shares in the corporation.

18 THE COURT: Then we'll have to have
19 evidence.

20 MR. LOWRY: We can, but I don't think
21 there's any dispute that there was to be a transfer of
22 the shares.

23 Are we agreed on that?

24 MR. HOEGE: That's correct, Your Honor, and
25 as far as this portion of the proffer, I don't believe

1 that the plaintiffs are asserting that anything to do
2 with the 1987 negotiations would establish personal
3 jurisdiction in any way.

4 MR. LOWRY: That's correct, that's correct.
5 This is just background.

6 THE COURT: I don't have a problem with that
7 because of the way I see it, but when time came to
8 deliver the shares, they weren't delivered and the
9 question becomes where are they deliverable to.

10 MR. LOWRY: I don't think that's a problem.
11 I'll get into that in a second.

12 I don't think anybody disagrees there was to
13 be a transfer of the shares. Dr. Putz had been advised
14 by an attorney in French Polynesia that the best way to
15 do it is to set up an American corporation, have the
16 shares transferred into that. For some reason, he felt
17 it would be easier. So Panonia Realty, a corporation,
18 was created. The initial stockholders were made to be
19 the Goldens. The shares, by contract or by the
20 documentary transaction, were transferred into Panonia.
21 Then the shares in Panonia were transferred by the
22 Goldens to Dr. Putz.

23 Everything went along fine for a long period
24 of time. Dr. Putz discharged all his obligations.

25 THE COURT: So everybody thought that would

1 accomplish what needed to be accomplished.

2 MR. LOWRY: Everybody thought it was done at
3 that point in time, I believe.

4 THE COURT: That's the proffer.

5 MR. HOEGE: All right. Should I say my
6 objection?

7 THE COURT: I think --

8 MR. HOEGE: Again, the dispute that we would
9 have on this point, Your Honor, would be that the extent
10 to which the Goldens were made shareholders of Panonia.
11 Absolutely do not dispute that Panonia was established,
12 that shares of the SCIP were to be transferred to
13 Panonia Realty pursuant to the underlying contract.
14 Whether or not the Goldens were made shareholders is a
15 matter in dispute.

16 MR. LOWRY: Again, I would submit, although
17 we think it will be clear that they were, that even if
18 they weren't, it's irrelevant to today's proceedings
19 because the question is when and if they had contact
20 relating to this transaction with Virginia. That's what
21 I'm creeping up on at this point.

22 Obviously, I think both sides will agree,
23 and again, correct me if I'm wrong, that everybody
24 thought what needed to be done had been done, whatever
25 that is, to transfer the Goldens' interest to Dr. Putz.

1 Dr. Putz paid the purchase price. He went on for
2 18 years paying the annual maintenance fee and other
3 fees, taking care of it. Actually even served as
4 president of the board of directors of -- everybody is
5 calling it SCIP. That's the acronym for the bungalow
6 group. Everything went along fine until he tried, and I
7 believe it was in 2005, to get the bungalows actually
8 titled to him in exchange for the certificates. At that
9 point, SCIP balked and said no that the transfer --

10 THE COURT: Does SCIP sound for something?

11 MR. LOWRY: I'm sorry. It's in the
12 pleadings. It's a long French name.

13 THE COURT: Is the acronym, SCIP?

14 MR. LOWRY: Yes, sir. That's basically the
15 homeowner's association.

16 DR. PUTZ: Your Honor, it's Societe Civile
17 Immobiliere Paepaepupure.

18 THE COURT: I'm a redneck, so I can't speak
19 French. SCIP is fine for me.

20 MR. LOWRY: That may be my misstatement.

21 At any rate, they balked and said they
22 wouldn't do it. Dr. Putz brought an action in court in
23 French Polynesia to force them to transfer title to him.
24 At the trial level, they won. He then turns around and
25 contacts Dr. Golden and tells him what's going on and

1 they discuss it. This is where I think we probably have
2 some disagreement, but I'm not even sure of that. Dr.
3 Putz' testimony --

4 THE COURT: Looks like people are in and out
5 between the sheets a lot in this case. Sometimes
6 they're in bed with each other and sometimes they're at
7 odds with each other because they're trying to get the
8 job done.

9 MR. LOWRY: Could be. But at this point,
10 they discuss what can be done about it and they
11 discussed Mr. Golden providing an affidavit to say,
12 look, I intended to transfer ownership to Dr. Putz and
13 this is how it was done. So an affidavit was prepared.
14 Dr. Putz' testimony will be it was prepared after joint
15 conversation about it's contents. I don't know what Dr.
16 Golden will say.

17 At any rate, our testimony will be that the
18 affidavit was prepared. It was sent to Dr. Golden, who
19 signed it, sent it back to Dr. Putz, in Virginia, and
20 that the conversations leading up to the affidavit were
21 by Dr. Putz in Virginia, Dr. Golden in Washington.

22 The affidavit was sent to Virginia. Dr.
23 Golden used that in an attempt to persuade the appellate
24 Court to overturn the trial court, unsuccessfully.
25 Ultimately, they said the certificates had not been

1 properly --

2 THE COURT: The appellate court reversed the
3 trial court.

4 MR. LOWRY: No, they sustained the trial
5 court in saying the shares had not been properly
6 transferred.

7 So at this point, Dr. Putz is out. The
8 record owners of the shares are still the Goldens. So
9 he's at the point that brings us here today. He wants
10 either his bungalow or his money back that he paid for
11 the bungalow and that's what brings us up to today.

12 Under our theory of the case, as you've seen
13 in the pleadings, number one, that contact of sending,
14 which was part of contract performance, sending the
15 affidavit to Virginia, is sufficient under Virginia's
16 long arm statute to establish jurisdiction and satisfies
17 --

18 THE COURT: That's what Judge Moon found.

19 MR. LOWRY: Right. And that satisfies the
20 requirements of due process. But there's more than just
21 that and Judge Moon found this as well. If our theory
22 of the case is right, then there's still an obligation
23 on the parts of the Goldens to transfer that property or
24 pay the money back and that that performance of the
25 contract will, of necessity, have to take place at least

1 partially in Virginia.

2 So those are the two basis where we find
3 sufficient contact under Virginia law and the due
4 process clause to establish jurisdiction and those are
5 the two basis on which Judge Moon ruled that there was
6 jurisdiction in this matter.

7 How much of that I'm going to need to put on
8 by way of evidence, I'll leave up to Mr. Hoege and I'm
9 happy to put it all on or just whatever portion he feels
10 is really contested.

11 THE COURT: Other than what you've already
12 said about the degree to which the Goldens were made
13 shareholders, is there any disagreement with the
14 representation and proffer of facts?

15 MR. HOEGE: It's --

16 THE COURT: It's not a trick question. I'm
17 not trying to trick anybody. If there isn't, we may go
18 one way and if there is, we may have to go another.

19 MR. HOEGE: Forgive me. I may give you a
20 little more information than you're asking for.

21 I would also add that with respect to the
22 1987 negotiations, there was the question of whether or
23 not we were talking about stock certificates or shares.
24 I think both sides agree that that doesn't impact --
25 ultimately, something had to be transferred. We would

1 say you would refer to them as shares.

2 MR. LOWRY: That's fine.

3 THE COURT: Let me just put it -- there was
4 a physical item that represented the intangible interest
5 in the corporation; is that correct?

6 MR. HOEGE: We don't know that, Your Honor.

7 THE COURT: I mean, if you become a
8 shareholder, you've got an intangible interest that's
9 represented by a tangible piece of paper, right? And if
10 you transfer that, that's the indicia of ownership and
11 you don't need to record it because that's the ownership
12 as opposed to a title to real estate which you need to
13 record and you don't have to have that. You can hold it
14 without ever recording it.

15 MR. LOWRY: Sometimes it's just the
16 agreement itself that transfers it's interest without a
17 piece of paper.

18 THE COURT: Right.

19 So irrespective of all of that -- here's
20 where I'm coming from and help me if you can.

21 This is one of those cases where nobody
22 seems to be falling out over what the agreement was.
23 The problem is that between the date that the agreement
24 was struck and the time performance is to occur, which
25 it hasn't occurred yet, the potential is, and that's the

1 issue here, the potential for the place of performance
2 changes -- is that a fair statement -- from one place
3 with it's consequences back in French Polynesia, to
4 another place, with it's consequences back in French
5 Polynesia. To me, that seems to be the issue here.

6 MR. HOEGE: I think it's close to the issue.

7 THE COURT: I don't want to get close. I
8 want the issue.

9 MR. HOEGE: Your Honor, really, I think it
10 is ultimately important to the question of personal
11 jurisdiction because our position is that the
12 performance did occur and in fact, all the documents
13 suggest that the performance did occur.

14 THE COURT: My question to you men this
15 morning was going to be, Judge Moon found partial
16 performance in Virginia. The facts will either support
17 or dispel that. If they support it, his decision stands
18 and all I would say is, Your Honor, your decision
19 stands. Readopt it. If it doesn't support that, I would
20 say the facts don't support that and your decision can't
21 stand.

22 Then we have the other issue, which I'm sure
23 he wants me to resolve, too, is whether there's been an
24 alleged tort committed because you do assert a tort
25 claim in your pleading, right?

1 MR. LOWRY: We do. I don't know that
2 there's a 12(b)(6) on that at this point.

3 THE COURT: No, but the problem is, if you
4 commit a tort anywhere that has consequences in
5 Virginia, you're on the hook. So if you have
6 jurisdiction over the tort, don't you have jurisdiction
7 over the whole set of transactions that are interrelated
8 to the tort, whether they're in contract or not? At
9 least, that's what my conflicts professor told me.

10 MR. HOEGE: Your Honor, I think the question
11 of stock certificates and delivering a piece of paper or
12 not is important and the question of performance or not
13 is important.

14 THE COURT: We'll have to hear the evidence
15 about that.

16 Is that what you came prepared to deal with?

17 MR. LOWRY: We are, although I'd like to
18 hear what the theory is about why they're important.

19 THE COURT: I don't care what the theories
20 are. If they don't have countervailing evidence, you
21 win.

22 MR. LOWRY: The ultimate question of whether
23 or not they have fully performed is a trial question.
24 It's not a jurisdictional hearing question.

25 THE COURT: No question.

1 Full performance is not the issue here.
2 It's whether or not there's any performance in Virginia
3 because under the long arm statute and under
4 constitutional principles of minimum sufficient
5 contacts, they both would fall and give jurisdiction to
6 the Court. That's why my question was, is Judge Moon's
7 determination of partial performance right or wrong
8 based on the preponderance of the evidence at an
9 evidentiary hearing.

10 MR. LOWRY: I would submit that the issue of
11 partial performance, as opposed to full performance, has
12 to be judged at this stage of the case on our pleadings,
13 that we have pled it was only partial, rather than your
14 having to determine was it partial performance back in
15 '87 or completed performance back in '87.

16 THE COURT: I'm ready to deal with that,
17 legal issue, too. I don't think it matters. The
18 contract is not complete because the deed hasn't been
19 delivered.

20 MR. LOWRY: That's our position.

21 MR. HOEGE: That's their position, Your
22 Honor. So far, there's --

23 THE COURT: There hasn't been sufficient
24 performance to the extent that plaintiff claims there's
25 been a breach of the contract. Or in the alternative,

1 there's been -- or you're actually demanding it. This
2 is an injunction proceeding, isn't it? You're demanding
3 a declaration to proceed to transfer a title, right?

4 MR. HOEGE: No.

5 THE COURT: What are you asking?

6 MR. HOEGE: Your Honor, we're here on our
7 motion.

8 THE COURT: I mean, the plaintiff is asking
9 that the -- that something be done to actually transfer
10 title or get their money back.

11 MR. LOWRY: That's correct.

12 THE COURT: Recision or performance.

13 MR. LOWRY: That's correct.

14 THE COURT: It's an old fashioned property
15 case.

16 MR. LOWRY: That's right. It's as basic as
17 you get.

18 THE COURT: That's the only way I can
19 resolve it.

20 MR. HOEGE: Your Honor, our request to you
21 would be to retain an open mind about whether or not
22 performance has been performed -- whether or not
23 performance has occurred or not because --

24 THE COURT: That's exactly what I came in
25 here to do because I have no qualms. I've been called on

1 several times to reverse a district judge by below by
2 making findings. He sent it to me to determine whether
3 he was right or wrong.

4 MR. LOWRY: Could I just ask one other
5 question of Mr. Hoege?

6 Is there an issue as to whether or not the
7 affidavit was signed by Mr. Golden and sent to Virginia?

8 THE COURT: Is there a question of fact over
9 whether it was signed by Mr. Golden and sent to
10 Virginia?

11 MR. HOEGE: There is no question of fact as
12 to that.

13 THE COURT: That it did occur.

14 MR. HOEGE: That it did occur.

15 The questions of fact surrounding the
16 formation of the affidavit though are in dispute, Your
17 Honor.

18 THE COURT: That's fine.

19 MR. LOWRY: In that case, based upon the
20 proffer and the response to the proffer, Your Honor has,
21 I believe, the affidavit. It's an exhibit to the
22 complaint.

23 THE COURT: Let's see if I've got it.

24 MR. LOWRY: I don't believe the Court can
25 take parole evidence on whether or not the contents of

1 the affidavit is accurate if it's not vague. Four
2 corners rule in Virginia takes care of that.

3 THE COURT: Parole evidence rule.

4 MR. LOWRY: That's correct, parole evidence
5 rule.

6 I would submit that on it's face, the
7 affidavit, which has been admitted to have been sent to
8 Virginia and signed by Dr. Golden, states the predicate
9 facts.

10 MR. HOEGE: Your Honor, we have --

11 THE COURT: I feel like we're in a Laurel
12 and Hardy moment. This is a fine mess everybody has put
13 us in.

14 MR. HOEGE: We have a 106 objection to the
15 affidavit and we would just ask that the affidavit be
16 made complete. So the affidavit references by
17 incorporation paragraph four, a letter dated April 16,
18 1987.

19 THE COURT: 106, Federal Rule of Evidence?

20 MR. HOEGE: Yes, Federal Rule of Evidence,
21 106.

22 THE COURT: I haven't had an objection on
23 that ground in so long, I've got to go look it up.

24 Honestly, is that --

25 MR. HOEGE: 106 is the remainder of or

1 related writings of recorded statements. The rule
2 states, Your Honor --

3 THE COURT: You mean the completion rule?

4 MR. HOEGE: That's correct, Your Honor.
5 Sorry.

6 THE COURT: The rule says if they offer part
7 of it, you get to offer something else to complete it.
8 So they've offered the whole affidavit.

9 MR. HOEGE: Okay.

10 THE COURT: The affidavit does speak for
11 itself because there's no dispute that it was signed and
12 sent.

13 MR. HOEGE: And Your Honor, paragraph four
14 of the affidavit, references an annex and that annex is
15 not included.

16 THE COURT: Maybe your opponent over here
17 won't have a problem with that either if that's the
18 European term for attachment.

19 Mr. Lowry, is there any objection to the
20 Court considering the attachment in paragraph four that
21 says it's annexed, #2?

22 MR. LOWRY: I'm just looking at the
23 affidavit. #4 in mine says in accordance with the terms
24 of the sales contract, I notify --

25 THE COURT: Look at the parentheses at the

1 end.

2 MR. LOWRY: Oh, I see.

3 No, I have no objection to that being -- but
4 I'd like to see what they're proffering, but I don't
5 think we'll have a problem with it.

6 THE COURT: Show it to him.

7 MR. HOEGE: If you'll give me a moment, Your
8 Honor.

9 THE COURT: I will.

10 If that was part of the document, his whole
11 document argument needs to account for the whole
12 document.

13 Nobody is going to be able to figure out
14 this record we've created here this morning.

15 (Said document shown to counsel).

16 MR. LOWRY: I don't have any problem with
17 it.

18 THE COURT: Do you want to have the Court
19 receive that as a Defendant's Exhibit at the hearing,
20 which will be considered as part of the affidavit which
21 was filed with the complaint, which is Plaintiff's
22 Exhibit B to the complaint, which I take judicial notice
23 of because it's already been filed?

24 MR. HOEGE: Yes, Your Honor.

25 THE COURT: Is that agreed?

1 MR. HOEGE: That's agreed.

2 THE COURT: The complaint has been filed.
3 Along with the complaint was the affidavit. I take
4 judicial notice of the complaint and the affidavit,
5 along with your statement that there's no question that
6 the affidavit was signed by Mr. Golden -- Dr. Golden --
7 and sent to Virginia.

8 MR. HOEGE: That's correct, Your Honor.

9 THE COURT: Cool.

10 So we'll receive this as Defendant's Exhibit
11 1 for hearing purposes.

12 (Defendant Exhibit #1 was marked for
13 identification and admitted into evidence).

14 MR. LOWRY: Then I would renew my motion
15 that on it's face, the affidavit, which has been
16 admitted --

17 THE COURT: -- constitutes partial
18 performance.

19 MR. LOWRY: That's correct.

20 THE COURT: We're still at the proffer
21 stage. What we've gotten is a proffer. We had an
22 objection to a part of a proffer. Then we had a counter
23 proffer, which was this attachment or annex to the
24 affidavit, which the Court received, and essentially, a
25 stipulation that there's no debate or dispute over

1 whether the affidavit was signed by Dr. Golden and sent
2 to Virginia, to Dr. Putz, in Virginia.

3 MR. LOWRY: That's correct, yes, sir.

4 Basically, what we're moving the Court on is
5 the affidavit, the Defendant's Exhibit 1, and the
6 contract, which is also a part of the pleadings that we
7 ask you to take judicial notice of, all reflect, number
8 one, partial performance occurring in Virginia and on
9 the basis of our complaint as to when it occurred,
10 performance yet to occur that has to occur in Virginia.

11 THE COURT: This is a defining moment. Here
12 we are. The only question I have is, does the plaintiff
13 wish to present additional evidence to that which the
14 Court can take either judicial notice of for purposes of
15 these proceedings, that is, the attachments to the
16 complaint, or has been agreed to exist by the defendant?

17 MR. LOWRY: One second.

18 (Mr. Lowry conferred.)

19 THE COURT: Then it puts the burden on you
20 to provide evidence.

21 MR. HOEGE: I understand that, Your Honor.
22 Then I'd --

23 THE COURT: Then I'd give you a chance to
24 make whatever proffer and presentation you wish.

25 MR. HOEGE: Your Honor, I guess when they're

1 done, if I might speak for one moment.

2 MR. LOWRY: Yes, we have no further evidence
3 to put on at this point.

4 MR. HOEGE: Your Honor, what I'm not --

5 THE COURT: This is a great case. I'm sorry.
6 I'm having a good time.

7 MR. LOWRY: I can tell.

8 THE COURT: It's a mess, but it needs to get
9 straightened out.

10 MR. HOEGE: Your Honor, what I'm not clear
11 on is I'm hearing two different things and I want to be
12 sure I understand what you intend.

13 THE COURT: Here's what's happened. Can I
14 tell you what's happened and you can ask me to explain.

15 What's happened is there's really no dispute
16 over the facts that plaintiff came here to present.
17 That is to say, the background information, there's no
18 despite that historically, there was no connection with
19 Virginia; that this was a contract that was entered into
20 by parties who had no contact with Virginia for the sale
21 of a piece of property in French Polynesia. But because
22 of the delay and the vicissitudes of fulfilling the
23 contract, there was an event that took place that caused
24 the preparation of an affidavit, which is stipulated to
25 in it's entirety, including the annex from paragraph

1 four, by your client, the defendant, one of the
2 defendants, and sent to Virginia in furtherance of doing
3 under the contract what the parties intended to do under
4 the contract, upon which, without a hearing, Judge Moon
5 found to be partial performance.

6 The plaintiff says they don't have anymore
7 evidence. They're resting on that evidence. But if you
8 have countervailing evidence, it's my obligation and
9 desire to give you the opportunity to present any
10 evidence that you think because if this is the evidence,
11 I'm going to tell you, Judge Moon was right. If it's
12 not the evidence, which I have an open mind to as to
13 whether it is or not, then he may be right and he may
14 not be right. I have to determine. I don't mean in the
15 law, I mean in the facts.

16 MR. HOEGE: Your Honor, there is a -- I
17 think there are --

18 THE COURT: Nobody's trying to hoo-do
19 anybody else. This is not a "gotcha" kind of thing.

20 MR. HOEGE: Absolutely, Your Honor.

21 What I am having -- what the defendants are
22 having a problem with is the conclusion that the
23 affidavit equals partial performance of the contract.
24 There is no dispute that an affidavit was sent to
25 Virginia. How that affidavit was formed and the nature

1 of that affidavit is in dispute.

2 THE COURT: It may not be, but you want to
3 present evidence about it.

4 MR. HOEGE: We dispute the characterization
5 that that is partial performance of the contract.

6 THE COURT: That's a legal conclusion that
7 Judge Moon made. If you say there's law that suggests
8 that his conclusion of law based on the facts is
9 erroneous, I've got an open mind about that, too,
10 because he's going to want to hear about it.

11 MR. HOEGE: That's our position.

12 THE COURT: I completely understand. It was
13 the second question that I was going to have today
14 because the first one was, is there any dispute that
15 this affidavit -- what is the beef here -- and there
16 isn't one on the evidence. It really is about the
17 conclusion he drew about the evidence.

18 MR. HOEGE: That's correct, in terms of
19 characterizing the affidavit as partial performance. We
20 agree with that.

21 We would like the opportunity to present
22 additional evidence --

23 THE COURT: Concerning how the affidavit
24 came to be?

25 MR. HOEGE: Yes, Your Honor.

1 THE COURT: Do you have an objection to
2 that?

3 MR. LOWRY: Only if there's an allegation
4 that it was procured by fraud or mutual mistake of fact
5 or there's a finding that it's vague.

6 THE COURT: Here's what I'm going to do. I'm
7 going to reserve a ruling on that objection based on
8 those reasons. I'm going to let him present the
9 evidence. Then I'm going to make a determination of how
10 relevant it is or isn't to the decision of jurisdiction.

11 How's that? We're here to create a record.
12 I don't want to have to restart these proceedings.

13 MR. HOEGE: Yes, Your Honor.

14 THE COURT: Who do you want to call?
15 Plaintiff rests.

16 Why don't we take a recess and I'll let you
17 think about it?

18 MR. HOEGE: Thank you, Your Honor.

19 THE COURT: A lot of things have happened
20 here. There are procedural things going on, substantive
21 things going on. But I just want both sides to
22 understand, I think the key here is, first of all, is
23 whether the affidavit was executed and sent. That's my
24 humble view.

25 Secondly, whether that does constitute, if

1 there's authority out there to the contrary, whether
2 that does constitute partial performance under the
3 circumstances of this case, 99.44 percent of which are
4 not in dispute because the annex really confirms most,
5 if not all, of Mr. Lowry's proffer about the background
6 that's relevant.

7 Again, I've got an open mind on all of that.
8 I'm not trying to squeeze somebody into a particular
9 route.

10 MR. HOEGE: Thank you, Your Honor.

11 THE COURT: Think about it.

12 Hopefully, if you've got a case that says
13 that's not partial performance, I want to hear about it.
14 But I'll hear you anyway.

15 THE COURT: We're in recess.

16 (Recess at 10:30 a.m. until 2:15 p.m.)

17 We're back on the record after taking some
18 time for the parties to confer over some things.

19 I want to ask the defendants if they have
20 any evidence to present.

21 MR. HOEGE: Your Honor, first, I think that
22 we may have misunderstood some of the proffer earlier.
23 So I'd just like, if it's fine by the Court, to hear Mr.
24 Lowry's characterization of how the affidavit was
25 formed.

1 THE COURT: He didn't. He just said it was
2 formed, it was signed, it was submitted and you wanted
3 to complete the document with the attachment or what was
4 called the annex.

5 MR. LOWRY: What I either said or intended
6 to say was there was a telephone conversation between
7 Dr. Putz and Dr. Golden in which an affidavit was
8 discussed. Dr. Putz prepared a document, sent it to Dr.
9 Golden, who signed it and sent it back to Orange.

10 Is that accurate?

11 (Mr. Lowry conferred with his client).

12 MR. HOEGE: I'm sorry. Was the proffer that
13 Dr. Putz suggested the affidavit?

14 (Mr. Lowry conferred with his client).

15 THE COURT: His evidence would be it was
16 mutual.

17 MR. LOWRY: The lawyer in Paepaepupure, who
18 was the lawyer, for the transaction --

19 THE COURT: Spell that for the Court
20 Reporter.

21 COURT REPORTER: I have it, Your Honor.

22 MR. LOWRY: It's P-a-e-p-a-e-p-u-p-u-r-e.

23 He suggested to Dr. Putz that there be an
24 affidavit. Dr. Putz passed that along to Dr. Golden in
25 their conversation. They discussed the content. They

1 discussed whether or not an affidavit would be given.
2 Dr. Putz drafted it, sent it to Dr. Golden, who signed
3 it and sent it back.

4 THE COURT: That's the proffer.

5 Mr. Lowry's position has been unless there
6 is some alleged fraud or overbearing or anything else,
7 how it was put together is not relevant.

8 MR. HOEGE: That's right.

9 THE COURT: Because it was signed.

10 MR. HOEGE: Yes, Your Honor.

11 I believe that that last piece is a
12 characterization or statement of law or a conclusion of
13 law. Our position regarding the formation of the
14 affidavit is that in terms of trying to determine
15 minimum contacts, it is important to determine who
16 initiated, who drafted, et cetera, because of Fourth
17 Circuit precedent that would say that the unilateral --

18 THE COURT: So you disagree with the
19 characterization of the evidence?

20 MR. HOEGE: Absolutely, Your Honor.

21 THE COURT: Put on your evidence.

22 MR. HOEGE: Your Honor, defense would call
23 Mr. Golden.

24 MICHAEL GOLDEN, CALLED AS A WITNESS THE DEFENSE, SWORN

25 THE COURT: Have a seat. State your name

1 and then respond to all questions verbally.

2 THE WITNESS: Michael Golden.

3 THE COURT: Proceed.

4 MR. HOEGE: Your Honor, if you'll forgive
5 me, I may ask some questions for the sake of continuity
6 that have already been established by the proffer.

7 THE COURT: It's okay as long as it doesn't
8 get too repetitive.

9 DIRECT EXAMINATION

10 BY MR. HOEGE:

11 Q. Mr. Golden, we've been talking about the
12 formation of the 2005 affidavit. What was the purpose
13 of the call that you received from Dr. Putz?

14 A. Dr. Putz first called me mid May of 2005 about
15 the ownership problem of the bungalow and indicated at
16 that time that he was in the process of court hearings
17 to try and reverse the situation, but needed an
18 affidavit to support his evidence. I told him at the
19 time, I did not have anything as far as the original
20 purchase and sale. He agreed to send me copies, which
21 he did, and included the affidavit that he drafted and
22 directed me to sign and send back to him as soon as
23 possible. This all occurred within a week.

24 Q. Did you have any input into the language of the
25 affidavit?

1 A. No.

2 Q. What did you do after you had received the
3 affidavit?

4 A. I read it and then took it to the title company
5 that I used. Had it notarized and immediately sent it
6 back to him. As I said, it was solely for the purpose
7 of his court case at the time.

8 Q. When did you execute the affidavit?

9 A. May 31, 2005.

10 Q. Why did you return it to Dr. Putz?

11 A. He directed me to return it to him.

12 Q. Did Dr. Putz provide you anything to sign the
13 affidavit, to execute the affidavit?

14 THE COURT: You mean, did he pay anything?

15 BY MR. HOEGE:

16 Q. Did he pay anything to you to execute the
17 affidavit?

18 A. He directed me to sign the affidavit, get it
19 notarized and get it back to him so he could use it for
20 his defense in French Polynesia.

21 Q. Just to be clear, again, I'm asking, did he pay
22 you anything to do that?

23 A. No.

24 Q. Did he promise you anything to do that?

25 A. No.

1 THE COURT: When you use the word
2 "directed," that's what was requested of you to do, is
3 that right? He didn't stand there with a gun at your
4 head. He didn't have any authority over you to make you
5 do something you didn't want to do, right?

6 THE WITNESS: I wanted to help him at the
7 time.

8 THE COURT: Right. So that's the context in
9 which you used the word directed.

10 THE WITNESS: Yes.

11 BY MR. HOEGE:

12 Q. During the intervening time between the
13 transaction in 1987 and the phone call in 2005 from Dr.
14 Putz, how many times did you talk to him during that
15 time?

16 A. None, never.

17 Q. Did you ever get a call for funds from the SCIP
18 from 1987 to 2005?

19 A. No.

20 Q. Did you ever get invited to a general meeting or
21 General Assembly of the SCIP between 1987 and 2005?

22 A. From the date of closing to 2005, no.

23 MR. HOEGE: I have nothing further, Your
24 Honor.

25 THE COURT: Mr. Lowry?

1 CROSS-EXAMINATION

2 BY MR. LOWRY:

3 Q. Dr. Golden, let me hand you a document and ask
4 you if you recognize that as being a copy of the
5 affidavit you signed?

6 A. Yes.

7 Q. In the telephone conversation you had with Dr.
8 Putz, you indicated to him you were willing to sign an
9 affidavit, didn't you?

10 A. At his request, for his court case in French
11 Polynesia. That was the whole substance of our
12 conversation.

13 Q. Did you hear my question?

14 A. Pardon me?

15 Q. My question was, you told him over the phone you
16 would agree to sign the affidavit, did you not?

17 A. I didn't verbally say I would sign it, but he
18 directed me to sign it and get it back to him. I didn't
19 say, yes, I'll be happy to sign it for you.

20 Q. What did you say?

21 A. Discussed the fact that he needed this for
22 statement of facts for his court case in French
23 Polynesia.

24 Q. When he told you he needed it, what did you say?

25 A. I didn't say anything.

1 THE COURT: He told the Court just a second
2 ago that he wanted to help.

3 MR. LOWRY: Right. I understand that.

4 THE WITNESS: He wanted me to provide
5 evidence, the statement of facts.

6 BY MR. LOWRY:

7 Q. When you received it, I think you testified you
8 read it, right?

9 A. I read through it, yes.

10 Q. And you signed it, under oath?

11 A. I signed it, had it notarized, if that means the
12 same.

13 Q. Look at the second page, please. The notary says
14 it was sworn to before her on May 31, 2005. Is that
15 accurate?

16 A. I didn't actually swear that I did something. It
17 was notarized like I do everything in the state of
18 Washington.

19 Q. Do you understand it was under oath?

20 A. Not to the extent that it was under oath. I
21 thought she was just authorizing my signature.

22 Q. Did you see anything on there -- let me start
23 that again.

24 Did you intend to say anything in this affidavit
25 that was not true?

1 A. Frankly, I didn't read it thoroughly at the time
2 and just wanted to get it back to him, Dr. Putz, for his
3 court case.

4 Q. Now you've said twice that you read it. Did you
5 intend for anything in there to be a statement by you
6 that was not true? Did you intend to state an untruth?

7 A. I don't recall.

8 Q. So you might have intended to state an untruth?

9 MR. HOEGE: Objection, Your Honor;
10 relevance.

11 THE COURT: He's been somewhat evasive.
12 This is a bench trial.

13 Here's the question. If anything that you
14 knew, you knew it was going to be submitted in support
15 of trying to get the deed conveyed to him through the
16 court proceeding, correct?

17 THE WITNESS: Right.

18 THE COURT: And the conveyance of the deed
19 through the court proceeding was the end result of
20 whatever this agreement was that y'all had for him to
21 pay money for the bungalow, to you. You understand
22 that?

23 THE WITNESS: (No response).

24 THE COURT: You understand the court
25 proceeding was part of the process by which Dr. Putz was

1 trying to complete the transaction?

2 THE WITNESS: After he explained it to me,
3 yes.

4 THE COURT: You knew that this was going to
5 be filed in the court proceeding, right?

6 THE WITNESS: Yes.

7 THE COURT: You said it was for his court
8 proceeding.

9 THE WITNESS: Yes.

10 THE COURT: You didn't intend to mislead the
11 court in French Polynesia about anything concerning --
12 set forth in the affidavit, did you?

13 THE WITNESS: No.

14 THE COURT: So you intended for this to
15 represent what you believed to be true.

16 THE WITNESS: At the time, yes.

17 BY MR. LOWRY:

18 Q. Did you send it to him in Orange, Virginia?

19 A. I'm sorry?

20 Q. Did you mail it to Dr. Putz, in Virginia?

21 A. Yes.

22 Q. After that period of time, did you have further
23 telephone conversations with Dr. Putz over time?

24 A. Not for a long period of time.

25 Q. Ever?

1 A. Pardon me?

2 Q. Ever?

3 A. After --

4 MR. HOEGE: Objection, Your Honor;
5 relevance.

6 THE COURT: At any time between then and the
7 filing of the lawsuit.

8 MR. LOWRY: That's fine. I should have cut
9 it off then.

10 THE COURT: Sustained to that extent.
11 What's the answer?

12 MR. LOWRY: The answer is before the filing
13 of the lawsuit, he had other conversations with him.
14 BY MR. LOWRY:

15 Q. Is that correct?

16 A. Correct.

17 Q. Did you exchange e-mails with him?

18 A. Yes, I did.

19 Q. Was the subject matter of those conversations and
20 the e-mails the continuing effort on his part to get the
21 transaction completed?

22 A. On both our parts.

23 MR. HOEGE: Objection, Your Honor; beyond
24 the scope of direct.

25 THE COURT: Overruled. This is

1 cross-examination.

2 BY MR. LOWRY:

3 Q. I believe the answer was, on both your parts,
4 that was the purpose. Isn't that what you said?

5 A. Yeah.

6 Q. And when you e-mailed him, you e-mailed to him at
7 his address here in Virginia, right?

8 A. It's the only e-mail I had.

9 Q. That means yes.

10 A. Yes.

11 Q. And when you talked to him on the telephone, he
12 was in Virginia, correct?

13 A. I assume, yes. A couple times, he was in Texas.

14 Q. Sometimes in Texas and sometimes in Virginia?

15 A. As I remember, yeah.

16 MR. LOWRY: That's all I have.

17 THE COURT: Any redirect, counsel?

18 MR. HOEGE: No, Your Honor.

19 THE COURT: You may step down, sir.

20 MR. HOEGE: May I have a moment, Your Honor?

21 THE COURT: Of course.

22 MR. HOEGE: We have nothing further, Your
23 Honor.

24 THE COURT: Do you have any rebuttal?

25 MR. LOWRY: No, sir.

1 THE COURT: Do you wish to present argument
2 or do you want to have the Court take it under
3 advisement and allow y'all further consideration over
4 the matters we took a break for earlier today?

5 MR. LOWRY: The latter. That would be my
6 request.

7 MR. HOEGE: Absolutely, Your Honor.

8 THE COURT: I want to make a couple of
9 observations because I think it would be helpful for
10 y'all to know at least some of the things the Court is
11 thinking in order to help frame what y'all are doing
12 here.

13 First of all, I want to say that the
14 principles in this lawsuit, because the Court had some
15 dealing with them during the break, I understand your
16 dilemma. I sympathize with it from the standpoint that
17 it's not an easy thing to resolve because it does
18 involve events and circumstances that are totally under
19 control of a foreign state. Yet there are other
20 circumstances that are within your control that have
21 occurred in the past and some I hope will occur in the
22 future, but that's left to be seen.

23 When Judge Moon ruled without a hearing, it
24 was basically that the affidavit itself constituted part
25 performance and that's a legal matter that counsel for

1 the defendants has taken some issue with and challenges
2 whether that's an appropriate conclusion.

3 I do want to say that there's nothing that's
4 been presented today that would indicate that the
5 affidavit was executed under circumstances that would
6 demonstrate that Dr. Golden's will was overborne. I
7 want you to understand that. I don't think he even
8 suggested that it was. I think he wanted to be honest
9 with his answers. Yet when pressed, he was. I respect
10 that a great deal. Whether they help him or not is a
11 different question.

12 I do want to tell the parties, I'm not so
13 sure this case is in any different legal position than
14 it was in before the hearing was conducted. I'm only
15 saying that not to benefit or harm one side or the
16 other, but to let you know what I'm thinking because I
17 think it will help the parties deal with it. Whether
18 this case is here or in Washington state, it's going to
19 cost everybody money. I'm saying it publically because
20 I've said it to the parties privately and I have nothing
21 to hide.

22 I'm going to leave it at that. But I'm just
23 not so sure anything has changed what Judge Moon has
24 done, even though, as promised to counsel for the
25 defendant, I'm keeping an open mind.

1 I will reassess these and give it the same
2 due diligence I gave it before the hearing began. The
3 law is the law as far as what the contacts are.

4 One of the things that is disconcerting to
5 me, to the Court, is the fact that when the courts use
6 the term significant, I don't know if any of y'all
7 watched the championship Lacrosse weekend, but the
8 players have to get the ball across the magic line
9 within ten seconds. This is very similar. When they
10 touch the inside of the line, they're in because they
11 intended to do what they intended to do. Whether that
12 constitutes whether this part performance is, as a
13 matter of law, significant, that's the issue. Not
14 whether it constitutes part, but whether itself is
15 significant as a matter of law or whether this rises to
16 the level of significant contacts is the real crux of
17 the issue here. That's what I would have to resolve.

18 There's some good things that have come out
19 for the defense, there are some not so good things that
20 have come out for the defense. At first blush, as far as
21 the affidavit is concerned, it is today what it was when
22 Judge Moon looked at it. I just want everybody to know
23 that. Nothing has changed that.

24 Now, go out and settle the case. But if
25 not, I'm happy to rule and we'll have a written opinion.

1 MR. HOEGE: Your Honor, how long is it
2 continued for, may I ask?

3 THE COURT: I think we can give you a week
4 or two.

5 Judge Moon and I have been in communication
6 on this because I had to get an order entered to allow
7 me to mediate after I had already started. This is
8 early on in the process. This case is not an old case.
9 Y'all are exercising due diligence and raised a
10 significant legal question. I think we can give you
11 some breathing room.

12 MR. LOWRY: Why don't we say two weeks and
13 we'll contact the Court one way or the other jointly?

14 THE COURT: And if I can help in telephone
15 conversations among counsel, I don't mind being brought
16 in the loop, if it would help y'all resolve the matter.
17 I'm just a phone call away. If the parties don't
18 object, I'd be happy to try to help.

19 Nice meeting you, Dr. Putz.

20 DR. PUTZ: Thank you, Your Honor.

21 THE COURT: Nice meeting you, Doctor and
22 Mrs. Golden, and we hope things resolve.

23 We're in recess.
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INDEX

WITNESS FOR DEFT.

Direct

Cross

Michael Golden

31

35

EXHIBIT NO.

Marked

Admitted

Deft. #1

23

23

"I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled
matter.

/s/ Sonia Ferris

October 23, 2009"